

Larry W. Lee (State Bar No. 228175)
Max W. Gavron (State Bar No. 291697)
DIVERSITY LAW GROUP, P.C.
515 S. Figueroa Street, Suite 1250
Los Angeles, CA 90071
(213) 488-6555
(213) 488-6554 facsimile
lwlee@diversitylaw.com
mgavron@diversitylaw.com

Attorneys for Plaintiff and the Class

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

MARIE REBELO SHOWALTER, as an
individual and on behalf of all others
similarly situated,

Plaintiff,

vs.

NORTHERN CALIFORNIA CHAIR
CORPORATION, a California
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 21CV376845

[Assigned for all purposes to the Honorable
Theodore C. Zayner, Department 19]

**PLAINTIFF'S NOTICE OF MOTION AND
MOTION FOR PRELIMINARY APPROVAL
OF CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: November 1, 2023
Time: 1:30 P.M.
Dept.: 19

Complaint Filed: March 2, 2021
Jury Trial Date: None set

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on November 1, 2023, at 1:30 p.m., or as soon thereafter as
3 the matter may be heard, before the Honorable Theodore C. Zayner, judge presiding, in Department
4 19 of the above referenced Court located at 161 North First Street, San Jose, California 95113,
5 Plaintiff Marie Rebelo Showalter (“Plaintiff”) will and hereby does move this Court for the
6 following relief with respect to the Class and PAGA Action Settlement Agreement (“Agreement”)
7 entered into by Plaintiff and Defendant Northern California Chair Corporation (“Defendant”)
8 (together with Plaintiff, the “Parties”):

9 1. That the Court approve the Agreement referenced above;

10 2. That the Court conditionally certify the following Class for settlement purposes
11 only: all current and former non-exempt sales employees who worked for Defendant in California
12 any time between May 1, 2019 and July 11, 2023, inclusive (“Class Members” or the “Class”);

13 3. That Plaintiff Marie Rebelo Showalter be appointed as the Class Representative and
14 Larry W. Lee and Max W. Gavron of Diversity Law Group, P.C. be appointed as Class Counsel;

15 4. That the Court preliminarily approve the Agreement and the total Gross Settlement
16 Amount in the amount of Five Hundred Thousand Dollars and Zero Cents (\$500,000.00);

17 5. That the Court finds on a preliminary basis that the Agreement appears to be within
18 the range of reasonableness of a settlement, including the amount of the PAGA penalties, the
19 service award to the Class Representative, Class Counsel award of attorneys’ fees and costs,
20 settlement administration costs, and the allocation of individual payments to Class Members, that
21 could ultimately be given final approval by this Court;

22 6. That the Court approve the mailing of the proposed Notice of Proposed Class Action
23 Settlement (“Notice of Settlement”) to be sent to Class Members;

24 7. That the Court appoint Phoenix Settlement Administrators as the Settlement
25 Administrator; and

26 8. That the Court schedule the matter for a Final Fairness and Final Approval hearing.

27 This Motion is made pursuant to Rule 3.769 of the California Rules of Court, which
28 provides for court approval of the settlement of a purported class action and allows the Court to

1 preliminarily certify a class for settlement purposes.

2 The basis for this unopposed Motion is that the proposed settlement is fair, adequate, and
3 reasonable, and the procedures proposed by the Parties are adequate to ensure the opportunity of
4 Class Members to participate in, opt-out of, or object to the settlement. This Motion is based on the
5 attached Memorandum of Points and Authorities, the Agreement and the proposed Notice of
6 Settlement, and the supporting Declarations of Larry W. Lee, Max W. Gavron, and Plaintiff Marie
7 Rebelo Showalter, upon the oral arguments of counsel (should there be any), and on the complete
8 records and file herein.

9
10 Dated: October 10, 2023

DIVERSITY LAW GROUP, P.C.

11
12 By: 

Larry W. Lee

13 Max W. Gavron

14 Attorneys for Plaintiff and the Class
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1 **I. INTRODUCTION**

2 This is a wage and hour class and representative Private Attorneys General Act (“PAGA”)
3 action seeking statutory and civil penalties under the California Labor Code. Plaintiff Marie Rebelo
4 Showalter (“Plaintiff”) alleges that Defendant Northern California Chair Corporation (“Defendant”)
5 failed to pay all overtime wages owed, provide off-duty meal breaks, reimburse business expenses,
6 provide accurate itemized wage statements, and pay all wages owed upon separation of
7 employment to its employees in violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 558,
8 1194, 2802, and 2698, *et seq.* Based on these violations, Plaintiff asserts class and PAGA claims for
9 violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 558, 1194, 2802, and 2698, *et seq.*, and
10 the Unfair Competition Law (“UCL”). The Parties have reached a class and PAGA action
11 settlement, the terms of which are reflected in the Parties’ Class and PAGA Action Settlement
12 Agreement (“Agreement”).

13 Prior to the settlement of this action, the Parties thoroughly investigated the facts relating to
14 the class and PAGA claims alleged in this lawsuit and engaged in a thorough study of the legal
15 principles applicable to the claims asserted against Defendant. Through the exchange of formal and
16 informal discovery in connection with mediation, Defendant provided necessary data pertaining to
17 the number of putative class members, a sampling and time and payroll records, as well as
18 information pertaining to Defendant’s commission pay and wage statement policies and practices.
19 The information provided by Defendant allowed Plaintiff to review and analyze the liability and
20 potential exposure. Thereafter, the Parties attended a full day of mediation with Retired Judge Brian
21 Walsh. While the Parties were unable to reach an agreement at mediation, they continued arm’s-
22 length negotiations facilitated by Judge Walsh over the course of several months and ultimately
23 reached the current settlement.

24 The terms of the Agreement provide that Defendant pay a Gross Settlement Amount of Five
25 Hundred Thousand Dollars (\$500,000.00) to resolve the class and PAGA claims. Significantly, the
26 entire Gross Settlement Amount will be distributed to the class on a **non-reversionary** basis, such
27 **that no remaining monies will revert to Defendant.** Further, no claim forms are required. The
28 following represents the key terms of the settlement:

- Gross Settlement Amount of \$500,000.00;
- Estimated class size of 240 individuals in the Class;¹
- Service Award to the Class Representative of up to \$10,000.00;
- Class Counsel’s attorneys’ fees of one-third of the Gross Settlement Amount, up to \$166,667.00;
- Class Counsel’s costs of up to \$25,000.00;
- Settlement administration costs of up to \$8,250.00;
- Payment to the California Labor & Workforce Development Agency (“LWDA”) of \$37,500.00, representing 75% of the total PAGA Payment of \$50,000.00;
- Net Settlement Amount of approximately \$240,083.33, which will be apportioned among the Class Members on a pro rata basis, based on the number of credited pay periods; and
- Raw average of approximately \$1,000.35 (\$240,083.33 / 240 class members) (to each Settlement Class Member (or Class Member who does not opt out of the settlement)).

The Parties and their respective counsel believe that the settlement for the consideration and on the terms set forth in the Agreement is fair, reasonable, and adequate, in light of all known circumstances and the expenses and risks inherent in litigation. Although Plaintiff and her counsel are confident that they can prevail on class certification, as well as on the merits, they recognize the inherent risks in drawn-out litigation and the specific risks that the Class might not be certified and/or that Plaintiff could fail to establish liability.

Therefore, the Parties respectfully request that the Court grant this Motion for Preliminary Approval of Class Action Settlement.

II. PROCEDURAL HISTORY

On February 12, 2021, Plaintiff filed her written notice with the California Labor &

¹ Class Members consist of all current and former non-exempt sales employees who worked for Defendant in California any time between May 1, 2019 and July 11, 2023, inclusive (the “Class”).

1 Workforce Development Agency, alleging violations of Labor Code §§ 201-203, 226, 226.7, 510,
2 512, 558, 1194, and 2802 pursuant to the Private Attorneys General Act, Labor Code § 2699
3 (“PAGA”). Declaration of Max W. Gavron (“Gavron Decl.”) ¶ 2. Thereafter, on March 2, 2021,
4 Plaintiff filed her class and PAGA Complaint against Defendant in the Superior Court of California,
5 County of Santa Clara. *Id.* ¶ 3. The Complaint alleges causes of action for: (1) violation of Labor
6 Code §§ 510, 558, and 1194; (2) violation of Labor Code §§ 226.7 and 512; (3) violation of Labor
7 Code § 2802; (4) violation of Labor Code § 226; (5) violation of Business and Professions Code §
8 17200, *et seq.*; and (6) violation of Labor Code § 2698, *et seq.* *Id.* ¶ 3.

9 Plaintiff’s class and PAGA claims as pled in the Complaint are predicated upon the
10 following allegations. With respect to Plaintiff’s overtime regular rate claim, Plaintiff contends that
11 Defendant failed to factor non-discretionary incentives, such as commissions, into the calculation of
12 the regular rate for purposes of paying overtime wages, and thus Plaintiff and employees were
13 underpaid overtime wages. With respect to Plaintiff’s meal period claim, Plaintiff contends that
14 Defendant failed to provide off-duty meal breaks to employees working shifts of five hours or
15 longer. Due to Defendant’s scheduling practices and lack of employee coverage, employees were
16 required to work through meal breaks but were not paid meal period premium compensation in lieu
17 of the missed breaks. With respect to Plaintiff’s reimbursement claim, Plaintiff contends that
18 employees were required to use their personal cell phones for work purposes but were not
19 reimbursed for the costs of such use. Finally, Plaintiff contends that Defendant issued deficient
20 wage statements due to the foregoing practices. As a result of the above, Plaintiff seeks statutory
21 and civil penalties under the California Labor Code and the PAGA, as well as attorneys’ fees and
22 costs. Gavron Decl. ¶ 4.

23 After the filing of the Complaint, the Parties met and conferred and agreed to participate in
24 private mediation. Gavron Decl. ¶ 5. In connection with mediation, the Parties engaged in informal
25 discovery to allow Plaintiff to assess the claims and liability, as well as analyze the maximum
26 exposure of damages and penalties. *Id.* Defendant provided Plaintiff’s counsel with informal data
27 and information pertaining to the number of putative class members, a sampling and time and
28 payroll records, as well as information pertaining to Defendant’s commission pay and wage

statement policies and practices. *Id.* The information provided by Defendant allowed Plaintiff to review and analyze the liability and potential exposure. *Id.*

On February 23, 2023, the Parties engaged in a full-day mediation with mediator Hon. Brian Walsh (Ret.). Gavron Decl. ¶ 6. The Parties did not reach an agreement at mediation and continued litigation of the Action. Plaintiff issued and Defendant responded to written discovery, participated in an informal discovery conference, and the Parties negotiated the distribution of a Belaire-West notice. Gavron Decl. ¶ 6. After further arm's-length negotiations facilitated by Judge Walsh over the course of several months, the Parties ultimately reached the current settlement. *Id.* ¶ 6. In resolution of Plaintiff's class and PAGA claims, the Parties entered into Agreement, a true and correct copy of which is attached as **Exhibit A** to the Declaration of Max W. Gavron. *Id.* ¶ 6.

The Parties recognize the risk, expense, and delay in continuing litigation with the class and PAGA claims, and believe the settlement to be fair, reasonable, and adequate. Gavron Decl. ¶ 7. Accordingly, the Parties desire to settle, compromise, and discharge all disputes and claims arising from or relating to the class and PAGA claims as set forth in the Agreement.

III. DISCUSSION

Any settlement of a class action lawsuit must be reviewed and approved by the Court. This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections. The *Manual for Complex Litigation, Third* § 30.41 states:

Approval of class action settlements involves a two-step process. First, counsel submits the proposed terms of settlement and the court makes a preliminary fairness evaluation. If the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness or other obvious deficiencies, such as unduly preferential treatment of class representatives or of segments of the class, or excessive compensation for attorneys, and appears to fall within the range of possible approval, the court should direct that notice...be given to the class members of a formal fairness hearing, at which arguments and evidence may be presented in support of and in opposition to the settlement.

(Fed. Jud. Ctr., 3rd ed. 1995).

Thus, the preliminary approval by the trial court is simply a conditional finding that the

1 settlement appears to be within the range of acceptable settlements. As Professor Newberg
2 comments, “[t]he strength of the findings made by a judge at a preliminary hearing or conference
3 concerning a tentative settlement proposal may vary. The court may find that the settlement
4 proposal contains some merit, is within the range of reasonableness required for a settlement offer,
5 or is presumptively valid subject only to any objections that may be raised at a final hearing.” Alba
6 Conte & Herbert B. Newberg, *4 Newberg on Class Actions* § 11.26 (4th ed. 2002).

7 The procedures for the parties’ submission of a proposed settlement for preliminary
8 approval by the court also are discussed in *4 Newberg on Class Actions*:

9 When the parties to an action reach a monetary settlement, they will
10 usually prepare and execute a joint Agreement of settlement, which is
11 submitted to the court for preliminary approval. The Agreement should
12 set forth the central terms of the agreement, including but not limited
to, the amount of settlement, form of payment, manner of determining
the effective date of settlement and any recapture clause.

13 *Id.* § 11.24.

14 Here, the Parties have reached such an agreement and have submitted to this Court in
15 connection with this Motion a copy of the Agreement fully setting forth the agreement reached by
16 the Parties. The Agreement sets forth all terms of the agreement reached by the Parties as to
17 settlement of the class and PAGA claims. Said terms in the Agreement include, among other things,
18 the method for calculating the Class Members’ individual portions of the settlement payment.

19 The parties also may, at the preliminary approval stage, request that the court provisionally
20 approve certification of the class for settlement purposes – conditional upon final approval of the
21 settlement. “[P]re-certification settlements are routinely approved if found to be fair and
22 reasonable.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 240 (2001); *accord Dunk v.*
23 *Ford Motor Co.*, 48 Cal. App. 4th 1794, 1803 (1996) (although the settlement was reached before
24 any “adversary certification,” the court was satisfied that it was “fair, adequate and reasonable”); *In*
25 *re Baldwin-United Corp.*, 105 F.R.D. 475, 478 (S.D.N.Y. 1984) (“many courts have employed this
26 practice in the name of judicial efficiency in order to facilitate apparently beneficial settlement
27 proposals”). As further explained by Professor Newberg:

28 The strength of the findings made by a judge at a preliminary hearing

1 or conference concerning a tentative settlement proposal...may be set
2 out in conditional orders granting tentative approval to the various
3 items submitted to the court. Three basic rulings are often conditionally
4 entered at this preliminary hearing. These conditional rulings may
approve a temporary settlement class, the proposed settlement, and the
class counsel's application for fees and expenses.

5 *4 Newberg on Class Actions* § 11.26.

6 In addition to such terms as class identification, settlement amount, and payment
7 procedures, the Agreement reached by the Parties contains a provision pursuant to which the Parties
8 stipulate to the Court's provisional certification of the Class for the purposes of this settlement only.
9 *See* Agreement ¶ 2.6.

10 **A. Proposed Class Definition**

11 The current settlement is being settled on behalf of a Class of "all current and former non-
12 exempt sales employees who worked for Defendant in California any time between May 1, 2019
13 and July 11, 2023, inclusive." *See* Agreement ¶ 1.9. Pursuant to the Agreement, Defendant has
14 represented that there are approximately 240 individuals that comprise the Class. *Id.* ¶ 1.22.

15 **B. Settlement Terms and Evaluation**

16 Courts presume the absence of fraud or collusion in the negotiation of settlement unless
17 evidence to the contrary is offered. *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars*
18 *Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987); *In re*
19 *Chicken Antitrust Litig.*, 560 F. Supp. 957, 962 (N.D. Ga. 1980).) Courts do not substitute their
20 judgment for that of the proponents, particularly where, as here, settlement has been reached with
21 the participation of experienced counsel familiar with the litigation. *Nat'l Rural Telecomms. Coop.*
22 *v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004); *Hammon v. Barry*, 752 F. Supp. 1087
23 (D.D.C. 1990); *Steinberg v. Carey*, 470 F. Supp. 471 (S.D.N.Y. 1979); *In re Armored Car Antitrust*
24 *Litig.*, 472 F. Supp. 1357 (N.D. Ga. 1979); *Sommers v. Abraham Lincoln Federal Sav. & Loan*
25 *Ass'n*, 79 F.R.D. 571 (E.D. Pa. 1978).

26 While the recommendations of counsel proposing the settlement are not conclusive, the
27 Court can properly take them into account, particularly where, as here, they have been involved in
28 informal discovery and negotiations for some period of time, appear to be competent, have

experience with this type of litigation, and have exchanged substantial evidence from the opposing party. *See Newberg on Class Actions, supra* § 11.47; *Nat'l Rural Telecomms. Coop.*, 221 F.R.D. at p. 528 (“[s]o long as the integrity of the arm’s length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement...[citations] and ‘great weight’ is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation”).

Here, both Plaintiff’s and Defendant’s counsel have a great deal of experience in wage and hour class action litigation. Plaintiff’s counsel has been approved as class counsel in a number of wage and hour class actions and has extensive litigation experience. Declaration of Larry W. Lee (“Lee Decl.”) ¶¶ 6-8; Gavron Decl. ¶¶ 27-33. Each side has apprised the other of their respective factual contentions, legal theories and defenses, resulting in negotiations taking place between the Parties. Gavron Decl. ¶ 8.

Based on the class data provided by Defendant, Plaintiff estimated that Defendant would face potential liability of up to approximately \$3.1 million for Plaintiff’s overtime regular rate, late payment, reimbursement, and wage statement class and PAGA claims if Plaintiff succeeded at trial. Gavron Decl. ¶ 9. Plaintiff was able to estimate the potential penalties based on data provided by Defendant, including the number of employees in the putative class, the number of pay periods at issue, and the estimated average hourly rate of pay applicable to the putative class members. *Id.* ¶ 9.

Plaintiff estimated Defendant’s maximum exposure as follows:

Claim	Estimated Exposure	Calculations/Formula
Overtime	\$61,720.00	\$10 for each pay period
Meal Period	\$1,141,820.00	100% violation rate assuming 10 shifts a pay period and \$18.50 average hourly rate
Labor Code § 2802	\$30,860.00	\$5 a pay period for cell phone use
Labor Code § 226	\$605,200.00	240 Employees and 6,172 pay periods
Labor Code § 203	\$719,280.00	162 Employees at \$18.50 average hourly rate x 30 days x 8 hours
PAGA	\$617,200.00	\$100 per pay period
Total Estimated	\$3,176,080.00	

Maximum Exposure		
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The estimated exposure above likely significantly overestimates the potential liability in this action for a number of reasons. For example, on Plaintiff’s overtime claim, Plaintiff estimated approximately \$10 in unpaid wages per pay period. However, Plaintiff’s theory of liability was dependent on employees earning commissions and overtime during the same period. Here, not every employee necessarily earned both types of compensation during the same pay period, and even when they did, the alleged miscalculation likely resulted in minimal underpaid wages because it was based on how Defendant calculated the regular rate of pay and whether Defendant properly factored in commissions to that calculation. Accordingly, the bulk of the damages associated with this claim likely would be in the form of waiting time penalties and wage statement penalties, which are discussed further below. Gavron Decl. ¶ 11.

For the meal period claim, Plaintiff estimated Defendant’s exposure at a 100% violation rate. This is likely overestimated because Plaintiff’s theory of liability focused on Defendant’s practices of staffing employees such that sufficient coverage was available for employees to take uninterrupted breaks. Further, Defendant argued that its obligation was only to make breaks available to employees—not to police them. *See Brinker Rest. Corp. v. Superior Ct.*, 53 Cal. 4th 1004, 1040, 273 P.3d 513, 537 (2012) (“On the other hand, the employer is not obligated to police meal breaks and ensure no work thereafter is performed.”). Defendant contended that it had compliant policies and therefore met its burden and did not have liability on this claim at all. Defendant further argued that even if Plaintiff could demonstrate liability, Plaintiff could certify this claim for class treatment because it was based on varying practices where Defendant had facially compliant policies. Gavron Decl. ¶ 12.

Plaintiff argued that employees were required to use their cell phones for work-related tasks. Defendant vehemently denied this contention. Defendant disputes the existence of a common policy that requires employees to use personal cell phones for work-related purposes because it maintained compliant written reimbursement policies. Gavron Decl. ¶ 13. Some courts have denied class certification of Section 2802 claims because liability hinges on individualized inquiries into

1 the actual expenses incurred by class members and whether each class member was fully
2 reimbursed pursuant to the policy. Plaintiff estimated \$5.00 a pay period for this claim, which was
3 discounted in evaluating the settlement because of the anticipated defenses to be raised by
4 Defendant.

5 With respect to waiting time penalties, Defendant maintained that it properly paid all
6 employees wages and thus was not liable for these damages. Defendant also argued that Plaintiff
7 could not establish that Defendant “willfully” failed to pay wages at separation of employment
8 and/or that a good faith dispute exists as to whether the allegedly underpaid monies were wages
9 due. This is a legal defense that, if successful, could potentially defeat Plaintiff’s Section 203
10 claim. *Chavez v. Converse, Inc.*, 2020 WL 1233919, at *1 (N.D. Cal. 2020) (holding that an
11 employer’s failure to pay is not willful where there is uncertainty in the law or a “good faith
12 mistaken belief that wages are not owed”). In *Naranjo v. Spectrum Security Services, Inc.*, __ Cal.
13 Rptr. 3d __, 2023 WL 2261253 (Feb. 27, 2023), review granted 2023 WL 3745105 (May 31, 2023),
14 the court upheld an employer’s good faith defense to the plaintiff’s claim for waiting time penalties,
15 pursuant to Labor Code § 203. The employer argued that it had a viable legal defense, which
16 precluded the imposition of waiting time penalties because its acts were not “willful” within the
17 meaning of the statute. *Naranjo* also permitted a good faith defense to rebut the plaintiff’s claim for
18 penalties, pursuant to Labor Code § 226. Gavron Decl. ¶ 14. Even had Plaintiff ultimately
19 prevailed on the merits, given the novelty of the legal questions it raised, Defendant may have
20 sought immediate appellate review through a writ or appeal. Thus, the maximum exposure
21 estimated on this claim was discounted for purposes of analyzing a reasonable settlement value.
22 Gavron Decl. ¶ 14.

23 Plaintiff’s wage statement claim was derivative of the other violations alleged. Thus, if
24 Plaintiff was not successful in establishing liability on those claims, then this claim too would fail.
25 Even if successful on liability, Defendant would have argued that it was not liable for wage
26 statement penalties because it did not willfully violate the statute, as explained above. Gavron Decl.
27 ¶ 15.

28 Finally, with respect to potential liability of Plaintiff’s PAGA claim, Plaintiff estimated that

1 Defendant could face civil penalties of up to a maximum \$617,200 if Plaintiff were successful at
2 trial. Gavron Decl. ¶ 16. However, even assuming Plaintiff ultimately prevails on her PAGA
3 claims, the Court still has discretion to reduce any PAGA penalties. Pursuant to Labor Code §
4 2699(e)(2), the Court can decline to award PAGA penalties where “if, based on the facts and
5 circumstances of the particular case, to do otherwise, would result in an award that is unjust,
6 arbitrary and oppressive, or confiscatory.” Indeed, as shown in the Court of Appeal’s decision in
7 *Carrington v. Starbucks Corp.*, 30 Cal. App. 5th 504 (2018), while the plaintiff prevailed on his
8 PAGA claim upon trial, the trial court reduced the maximum PAGA penalty amount by 90%, citing
9 the employer’s good faith attempt at complying with the law. *Id.* at p. 517. Upon review, the Court
10 of Appeal found such reduction to be proper. *Id.* at p. 539.

11 Although Plaintiff believes in the merits of the alleged claims and maintains that there is no
12 reason for reducing PAGA penalties, Plaintiff is aware that Defendant may raise defenses to the
13 claims and further with respect to the reduction of PAGA penalties and that it could be persuasive
14 to the Court. Gavron Decl. ¶ 18. Thus, even if Plaintiff were to successfully prove her claims at
15 trial, there is a possibility that the Court may only award a small percentage of PAGA penalties, as
16 the Court has discretion to do so. The Gross Settlement Amount was premised with this risk in
17 mind, associated with the possibility of the Court significantly reducing Plaintiff’s PAGA penalties,
18 along with other attendant risks, even if Plaintiff was to prevail at trial. *Id.*

19 Thus, the settlement for each Class Member is fair, reasonable, and adequate, given the
20 inherent risks of litigation, including the substantial risks relative to class certification and the
21 merits of the claims, the costs of pursuing such litigation, and the risks associated with the Court’s
22 discretion to reduce PAGA penalties. The settlement is the result of extensive arm’s-length
23 negotiations between the Parties and their counsel and was facilitated by an experienced and neutral
24 mediator.

25 Although Plaintiff believes that the class can be certified, Plaintiff also believes in the
26 fairness of the settlement that is based on factoring in the uncertainty and risks to Plaintiff involved
27 in not prevailing on one or more of the causes of action or theories alleged in the operative
28 Complaint, the possibility of non-certification, and the potential for appeals. Gavron Decl. ¶ _.

1 These risks on class certification are compounded by the California Supreme Court’s holding in
2 *Duran v. U.S. Bank Nat’l Ass’n*, 59 Cal. 4th 1 (2014). There, the plaintiffs obtained class
3 certification and subsequently prevailed at trial after eight years of litigation, but the judgment and
4 the certification ruling were reversed by the California Supreme Court after an additional five years
5 of litigation. The case was remanded back to superior court where class certification was denied and
6 plaintiffs’ subsequent appeal also was denied.

7 Indeed, numerous courts have held that **gross** settlements approximating between only 8 and
8 25% of the defendant’s potential exposure are fair and reasonable. *See, e.g., In re Mego Fin. Corp.*
9 *Secs. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding that class action settlement recovering 16%
10 of potential exposure was fair and reasonable; “[i]t is well-settled law that a cash settlement
11 amounting to only a fraction of the potential recovery does not per se render the settlement
12 inadequate or unfair. Rather, the fairness and the adequacy of the settlement should be assessed
13 relative to risks of pursuing the litigation to judgment”; noting that whether the settlement is fair
14 and adequate depends on the “the difficulties in proving the case”); *Bellinghausen v. Tractor Supply*
15 *Co.*, No. 13-CV-02377-JSC, 2015 WL 1289342, at p.*6 (N.D. Cal. Mar. 20, 2015) (holding that
16 class action settlement recovering between **8.5% and 25%** of the defendant’s potential exposure
17 was fair); *Van Ba Ma v. Covidien Holding Inc.*, U.S. Dist. Ct. Case No. 8:12-cv-02161 (C.D. Cal.
18 2014) (granting preliminary approval of wage and hour class settlement which obtained **only 9.1%**
19 of projected damages, given the risks of continued litigation); *Villegas v. J.P. Morgan Chase & Co.*,
20 No. CV 09-00261 SBA EMC, 2012 WL 5878390, at p.*6 (N.D. Cal. Nov. 21, 2012) (holding that
21 gross class action settlement of approximately 15% of the potential recovery was fair and
22 reasonable).

23 Here, the total amount of class and PAGA penalties amount to approximately \$3.1 million,
24 without discounting for potentially losing on any of the causes of action. Gavron Decl. ¶ 17. The
25 Gross Settlement Amount is \$500,000.00, which is approximately **16%** of the maximum class and
26 PAGA penalties. *Id.* Thus, the settlement was negotiated at arm’s-length and the high settlement
27 percentage-to-recovery further supports that the settlement is fair and reasonable.

28 Despite the asserted fairness of the settlement terms, as set forth in the Notice of Proposed

Class Action Settlement (“Notice of Settlement”), should any Class Member wish to pursue his or her own case for the claims being released herein, each Class Member has the right to submit a Request for Exclusion (*i.e.*, opt-out) from the settlement. *See* Notice of Settlement, attached as **Exhibit B** to Gavron Decl. Moreover, as set forth in the Notice of Settlement, Class Members are advised of their right to object to any of the terms contained in the Agreement and attend the final approval hearing. *Id.*

1. Amount and Manner of Distribution of the Compensation to be Provided to Class Members Including the Amount, or an Estimate, of What Each Class Member Will Receive

The Agreement provides for Five Hundred Thousand Dollars and Zero Cents (\$500,000.00) as the Gross Settlement Amount. *See* Agreement ¶ 1.22. The Net Settlement Amount, calculated after deduction of attorneys’ fees (up to \$166,667.00), litigation costs (up to \$25,000.00), the service award to the Class Representative (up to \$10,000.00), payment of PAGA penalties to the LWDA (\$37,500.00) and Aggrieved Employees (\$12,500.00), and Administrative Costs (up to \$8,250.00), is estimated to be approximately **\$240,083.33**. *Id.* ¶¶ 1.2, 1.12, 1.27, 6.3, 6.5.

Based thereon, on a raw average, each Class Member may potentially recover approximately \$1,000.35 (\$240,083.33 / 240 class members). Gavron Decl. ¶ 20. The amount actually paid to each Class Member may increase or decrease depending on the actual number of pay periods worked by each Class Member during the Class Period. *Id.* ¶ 20.

The Agreement also provides for Twelve Thousand Five Hundred Dollars and Zero Cents (\$12,500.00) to be distributed to Aggrieved Employees in settlement of their claims for civil penalties under PAGA. *Id.* ¶¶ 1.32, 6.5, 6.5.3. Aggrieved Employees are defined as “all current and former non-exempt sales employees who worked for Defendant in California in the PAGA Period [the period from February 12, 2020, through July 11, 2023].” *Id.* ¶¶ 1.3, 1.33.

Finally, the terms of the settlement provide that uncashed checks (upon the expiration date) shall be distributed to Legal Aid at Work, a non-profit organization the provides legal services and advocacy to low-income individuals, in accordance with California Civil Procedure § 384. *See* Agreement ¶ 6.9; *see* Gavron Decl. ¶ 22. Class counsel does not have any conflicts of interest with the proposed beneficiary. Gavron Decl. ¶ 22.

1 **2. Whether, and Under What Circumstances, Amounts Available for**
2 **Payment in Settlement Might Not Be Paid to Class Members or Might**
3 **Revert to the Defendants**

4 This settlement is non-reversionary, meaning that none of the settlement funds will revert to
5 Defendant.

6 **3. Scope of the Release of Class Members' Claims**

7 As a condition of participating in this settlement, Class Members who do not opt out of the
8 Settlement ("Settlement Class Members") will release the following claims ("Released Class
9 Claims"):

10 any and all claims arising during the Class Period, inclusive, under state
11 or local law, reasonably arising out of the factual allegations and claims
12 pleaded in the Complaint in this Action (i.e., Violations of Labor Code
13 §§ 226, 226.7, 510, 512, 558, 1194, 2698, and 2802; Business and
14 Professions Code § 17200, *et seq.*) and all other claims, such as those
15 under the California Labor Code, Wage Orders, regulations, and/or
16 other provisions of law, that could have been pleaded based on the facts
17 asserted in the Action, including: (1) failure to provide meal periods;
18 (2) inaccurate wage statements; (3) failure to pay all overtime wages
19 owed; (4) failure to reimburse employees for all necessary business
20 expenses; (5) all violations of the applicable Wage Orders based on the
21 facts alleged in the Complaint; (7) all violations of California's unfair
22 competition law based on the facts alleged in the Complaint; and (9)
23 interest, fees, and costs.

24 *See Agreement ¶ 1.39, 7.1.*

25 Regardless of whether they opt out of the class portion of the settlement, Class Members
26 who are also Aggrieved Employees will release the Precluded PAGA Claims. Agreement ¶¶ 1.37,
27 7.2. The Precluded PAGA Claims include "all PAGA Claims that this Agreement will extinguish,
28 through claim preclusion or issue preclusion, as a result of the Approval of the PAGA Settlement."
29 *Id.* ¶ 1.37. The PAGA Claims are defined as:

30 all claims for civil penalties sought under PAGA for violations of
31 California Labor Code sections 226, 226.7, 510, 512, 558, 1194, 2698,
32 2802 reasonably based on the facts alleged in the Complaint.

33 *See Agreement ¶¶ 1.31.*

34 Given that the releases are tailored to only claims pled in the operative Complaint, the

1 releases are appropriately limited.

2 **4. Tax Treatment of Settlement Amounts**

3 As this lawsuit seeks damages and penalties as recovery, the Parties have agreed that each
4 individual settlement class member payment to Class Members shall be characterized as 70%
5 penalties and interest and 30% wages. *See* Agreement ¶¶ 6.8.2. Amounts deemed wages shall be
6 reported on an IRS Form W-2. *Id.* ¶ 6.8.3. Individual PAGA payments to Aggrieved Employees
7 shall be characterized as 100% penalties. *Id.* ¶ 6.8.1.

8 **5. Affirmative Obligations to be Undertaken by Class Members or Class** 9 **Counsel and the Reasons for Any Such Obligations**

10 As stated above, Class Members do **not** need to do anything should they wish to receive
11 their share of the settlement funds. In other words, because this is not a claims-made settlement,
12 Class Members will not be required to make a submission to participate in the settlement. No claim
13 forms are required. Thus, this substantially decreases the amount of burden each Class Member
14 must bear in order to receive their share of the settlement funds.

15 If a Class Member does not wish to take part in this settlement or be bound by the Released
16 Class Claims, the Class Member must submit a Request for Exclusion. *See* Agreement ¶¶ 1.41,
17 5.2.1.

18 **C. Notice to Class Members**

19 Should the Court grant the instant motion, Defendant will provide the Settlement
20 Administrator with a list containing Class Members' names, employee ID numbers, last known
21 street addresses, email addresses, telephone numbers, Social Security numbers (as needed), and the
22 number of pay periods worked by each Class Member and each Aggrieved Employee
23 ("Confidential Data"). *See* Agreement ¶ 4.3. Pursuant to the Agreement, Defendant will provide
24 said Confidential Data within thirty (30) calendar days of preliminary approval. *Id.* Upon receipt of
25 the information and prior to mailing the Notice of Settlement to Class Members, the Settlement
26 Administrator shall perform a search based on the National Change of Address Database for
27 information to update and correct for any known or identifiable address changes. *Id.* ¶ 4.4.1.

28 Within twenty-one (21) calendar days of receipt of the Confidential Data from Defendant,

1 the Settlement Administrator will mail the Notice of Settlement to Class Members using the last-
2 known mailing address and e-mail address. *See* Agreement ¶ 4.4.1. Any Notice of Settlement
3 returned to the Settlement Administrator as non-deliverable on or before the response deadline shall
4 be re-sent via regular First Class U.S. Mail to the forwarding address affixed thereto. *Id.* ¶ 4.4.2. If
5 no forwarding address is provided, the Settlement Administrator will attempt to find the correct
6 address using a skip-trace or other comparable search to locate the most current address to re-mail
7 the Notice. *Id.*

8 The Notice of Settlement will advise Class Members of what the litigation is about, their
9 rights under the settlement, the total settlement amount and other terms of the settlement, their
10 expected settlement payment share, their opportunity to and procedures to opt out or to object to the
11 settlement, and the release of claims. *See* Notice of Settlement. As set forth in the Notice of
12 Settlement, Class Members will be allowed to opt out of or object to the settlement by a certain
13 deadline, which is 45 calendar days after the initial mailing of the Notice of Settlement. *See*
14 Agreement ¶¶ 1.15, 5.1. Class Members who received a re-mailed Notice of Settlement will have
15 that deadline extended by 10 (ten) calendar days from the original response deadline. *Id.* ¶ 4.4.2.
16 With respect to objections, Class Members are also informed in the Notice of Settlement that they
17 may object in writing or appear at the final approval hearing to present their objections to the Court.
18 *Id.* ¶ 5.3.1; *see* Notice of Settlement.

19 If Class Members need further information about the settlement and/or the lawsuit, Class
20 Counsel's contact information is provided in the Notice of Settlement. *See* Notice of Settlement, at
21 pp. 4-5. Class Members are also provided with the URL to the Court's website. *Id.*

22 **D. Typicality and Adequacy of Representation**

23 **1. Class Representative's Claims are Typical of the Class**

24 The commonality requirement is met when there are questions of law and fact common to
25 the class. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (1998) ("The existence of shared
26 legal issues with divergent legal factual predicates is sufficient, as is a common core of salient facts
27 couple with disparate legal remedies within the class"). Commonality requires only that some
28 common legal or factual questions exist; the plaintiffs need not show that all issues in the litigation

are identical. *See Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462, 473 (1981). Defendant's conduct is central to the commonality inquiry. *See City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 812-13 (1971). Where the employer's conduct is uniformly directed at a class of employees, as Plaintiff alleges here, the class-wide impact of the Defendant's policies satisfies the commonality requirement. *See Stephens v. Montgomery Ward & Co.*, 193 Cal. App. 3d 411, 421 (1987).

In the present case, Plaintiff alleges that Defendant is liable to the Class for failure to pay all overtime wages owed, failure to provide off-duty meal breaks, failure to reimburse business expenses, failure to provide accurate itemized wage statements, and failure to pay all wages owed upon separation of employment, in violation of Labor Code §§ 201-203, 226, 226.7, 510, 512, 558, 1194, 2802, and 2698, *et seq.* Like all Class Members, Plaintiff was subjected to these same policies and practices. Declaration of Marie Rebelo Showalter ("Rebelo Showalter Decl.") ¶¶ 3-6. In particular, Defendant miscalculated the regular rate of pay when paying overtime wages to Plaintiff whenever non-discretionary incentives, such as commissions, were paid to Plaintiff. *Id.* ¶ 3. In addition, Plaintiff was regularly unable to take off-duty meal breaks as a result of Defendant's staffing practices. She was not paid meal period premium compensation in lieu of the off duty breaks and was not reimbursed for the costs of using her personal cell phone for work purposes. The underpaid overtime wages, meal period premiums, and work reimbursements were not paid upon separation of employment. Plaintiff was also issued inaccurate wage statements that did not comply with Labor Code § 226(a). *Id.* ¶ 6. In other words, Plaintiff contends that she was subjected to the same policies and practices as other Class Members and thus, the typicality requirement is met.

Moreover, Plaintiff does not have any interests adverse to the Class, nor have any such issues been raised or presented. *Id.* ¶ 7. Plaintiff has taken all necessary steps to represent the interests of the Class, including by providing information and documents to Plaintiff's counsel. *Id.* ¶¶ 8-11. For such reasons, Plaintiff has adequately represented the Class Members and will continue to do so.

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1 **2. Class Counsel Has Adequately Represented the Class and Has**
2 **Experience with Wage and Hour Class Action**

3 From the inception of the case, Class Counsel has zealously represented the interests of the
4 Class. Class Counsel has exchanged written discovery and engaged in significant meet and confer
5 discussions with opposing counsel to obtain informal data and documents on behalf of the Class.
6 Gavron Decl. ¶ 24. The settlement was obtained for the benefit of the Class, as opposed to the
7 individual Class Representative. Further, Class Counsel has been approved as class counsel on a
8 number of prior cases, have litigated numerous other class action cases, and are competent to
9 represent the Class. Lee Decl. ¶¶ 6-8; Gavron Decl. ¶¶ 27-33.

10 **E. Costs and Fees**

11 **1. Attorneys' Fees and Costs**

12 California state and federal courts have recognized that an appropriate method for
13 determining award of attorneys' fees is based on a percentage of the total value of benefits to class
14 members by the settlement. *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254 (2001);
15 *Serrano v. Priest*, 20 Cal. 3d 25, 34 (1977); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980);
16 *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir. 1997). The purpose of this equitable
17 doctrine is to avoid unjust enrichment of counsel and to "spread litigation costs proportionally
18 among all the beneficiaries so that the active beneficiary does not bear the entire burden alone."
19 *Vincent*, 557 F.2d at p. 769.

20 The common fund doctrine is predicated on the principle of preventing unjust enrichment.
21 When a litigant's efforts create or preserve a fund from which others derive benefits, she may
22 require the passive beneficiaries to compensate those who created the fund. Both California state
23 and federal courts have embraced this doctrine. *Serrano III*, 20 Cal.3d at p. 35; *Vincent*, 557 F.2d at
24 p. 769. Similarly, in *City and County of San Francisco v. Sweet*, 12 Cal. 4th 105, 110 (1995), the
25 California Supreme Court recognized that the common fund doctrine has been applied "consistently
26 in California when an action brought by one party creates a fund in which other persons are entitled
27 to share." The reasons for applying the common fund doctrine include:

28 Fairness to the successful litigant, who might otherwise receive no

benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be properly and directly compensated should his efforts be successful.

Id.

Indeed, in 2016, the California Supreme Court has also now held that the award of attorneys' fees in common fund wage and hour class action settlements should start with the percentage method. *See Laffitte v. Robert Half Int'l*, 1 Cal. 5th 480, 503 (2016) ("We join the overwhelming majority of federal and state courts in holding that when class action litigation establishes a monetary fund for the benefit of the class members, and the trial court in its equitable powers awards class counsel a fee out of that fund, the court may determine the amount of a reasonable fee by choosing an appropriate percentage of the fund created").

The California Supreme Court in *Laffitte* affirmed a fee award representing 33 1/3 percent of the fund. *Laffitte*, 1 Cal. 5th at p. 506. And this was based on a lodestar amount that required a multiplier of 2.13. *Id.* at p. 487. As the Court held, only when the multiplier is "extraordinarily high or low [should] the trial court [] consider whether the percentage method should be adjusted so as to bring the imputed multiplier within a justifiable range." *Id.* at p. 505.)

The Parties have agreed to a payment of a maximum of one-third of the Gross Settlement Amount, or \$166,667.00, for payment to Class Counsel as attorneys' fees. *See* Agreement ¶ 6.3. The Parties have agreed to a payment of the foregoing attorneys' fees and, thus, this payment should be presumed to be fair. Further, the Parties have agreed to reimbursement of Class Counsel's litigation costs up to \$25,000.00. *Id.* Class Counsel has, at its own risk, expended costs, for example, to file this instant action and other pleadings in the case, effect service of process, participate in mediation, and advance other litigation-related costs. If Class Counsel's actual costs total less than \$25,000.00, the remainder will go to the Class for distribution.

Based on the foregoing, the Court should preliminarily approve the attorney's fees and costs as requested by the Parties.

1 **2. Proposed Payment to the Class Representative**

2 Class Representative Marie Rebelo Showalter requests a modest enhancement of
3 \$10,000.00. *See* Agreement ¶ 6.4. The Class Representative met and conferred with her counsel on
4 a number of occasions to discuss the case, provided documents and information to her counsel, and
5 reviewed pleadings and documents, including the Agreement. Rebelo Showalter Decl. ¶¶ 8-11. As
6 part of her duties as the Class Representative, Plaintiff provided invaluable information, evidence,
7 and documents that resulted in this settlement. Furthermore, in consideration for her service
8 payment, Plaintiff also executed an individual general release of all claims under California Civil
9 Code § 1542, which other members of the Class did not have to do. *See* Agreement ¶ 7.3.

10 In addition to the invaluable services that she provided, Plaintiff also took a significant risk,
11 both professionally and monetarily, in acting as the Class Representative and seeking benefits on
12 behalf of the Class. Because the claims alleged by the Class Representative involved the payment of
13 costs to the prevailing party, Plaintiff could have possibly faced paying the costs of Defendant, had
14 she not prevailed in this action.

15 Furthermore, given that future employers are much less likely to hire individuals who have
16 filed suit against their prior employer, particularly cases of this nature, Plaintiff may face prejudice
17 in the future from other potential employers. Plaintiff took this risk upon herself and the whole
18 Class benefited from these risks taken by Plaintiff. Class Members did not have to file individual
19 lawsuits and bear the risks of payment of costs if they did not prevail, nor did they have to face the
20 potential for retaliation and not getting future employment had they filed a public lawsuit.

21 **3. Settlement Administration Fees**

22 The Parties have agreed to an estimated payment of no more than \$8,250.00 to the
23 Settlement Administrator, Phoenix Settlement Administrators, to send notices and to administer this
24 settlement. *See* Agreement ¶¶ 1.2, 1.43. Phoenix Settlement Administrators is a well-recognized
25 class action settlement administrator. The Parties believe that the administration fee is reasonable
26 and should be approved.

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28 //

1 **IV. CONCLUSION AND ACTION REQUESTED AS PART OF THE MOTION FOR**
2 **PRELIMINARY APPROVAL**

3 The settlement presented here is fair, adequate, and reasonable. The settlement will result in
4 both substantial monetary benefits to Class Members; it is non-collusive; and it was achieved as the
5 result of informed, extensive, and arm's-length negotiations conducted by counsel for the respective
6 Parties who are experienced in wage and hour class action litigation and facilitated by an
7 experienced and neutral mediator.

8 For the foregoing reasons, Plaintiff respectfully requests that the Court grant preliminary
9 approval of the proposed settlement, sign the proposed Order, approve and authorize mailing of the
10 proposed Notice of Settlement, and set a date for a final approval hearing.

11
12 Dated: October 10, 2023

DIVERSITY LAW GROUP, P.C.

13
14 By: 

Larry W. Lee

Max W. Gavron

Attorneys for Plaintiff and the Class
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1 Department of Industrial Relations
2 Labor and Workforce Development Agency
3 Attn: PAGA Administrator
4 1515 Clay Street, Suite 801
5 Oakland, CA 94612
6 PAGA@dir.ca.gov
7 (Electronic Service Via LWDA Website)

8 X BY ELECTRONIC SERVICE: Based on a court order I caused the above-
9 entitled document(s) to be served through the Odyssey eFileCA E-Filing System at the website
10 www.california.tylerhost.net, addressed to all parties appearing on the electronic service list for
11 the above-entitled case. The service transmission was reported as complete and a copy of the
12 filing receipt/confirmation will be filed, deposited, or maintained with the original document(s)
13 in this office.

14 X BY ELECTRONIC SERVICE: I caused the above-entitled document(s) to
15 be served through the LWDA's Private Attorney General Act (PAGA) – Filing System at the
16 website [http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-](http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html)
17 [Act.html](http://www.dir.ca.gov/Private-Attorneys-General-Act/Private-Attorneys-General-Act.html), addressed to the LWDA as it appears on the electronic service list above. The service
18 transmission was reported as complete and a copy of the filing receipt/confirmation will be filed,
19 deposited, or maintained with the original document(s) in this office.

20 I declare under penalty of perjury under the laws of the State of California that the
21 above is true and correct. Executed on October 10, 2023, at Los Angeles, California.

22 
23 Erika Mejia